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Supreme Court of the United States

OCTOBER TERM, 1962

No. 177

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

Appellees Governor, Secretary of State and Attorney General, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move that the order of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument, or, in the alternative, that this appeal be dismissed.

Statement of the Case

This is an action to declare that Chapter 980 of the New York State Laws of 1961 violates the Fourteenth and Fifteenth Amendments of the Constitution of the United States and to enjoin defendants from enforcing or executing that statute. Appellants have appealed from an order denying a preliminary injunction against enforcement of Chapter 980.

The statute in question redistricts New York for the purpose of the forthcoming Congressional elections; it was made necessary by the State's loss of two seats in the House of Representatives as a result of the 1960 decennial census. See 2 U.S.C. § 2(a).

In their complaint, appellants allege that they are residents of the former Fourth Congressional District, and that the "Fourth Congressional District is practically identical with the new Sixth Congressional District except that certain neighborhoods which are part of the Fourth Congressional District, have been excluded from the new Sixth Congressional District, while other neighborhoods, not a part of the Fourth Congressional District, are included in the new Sixth Congessional District" (Complaint, par. 9). Appellants allege that they have not been included in the new Sixth District. They go on to allege that the redistricting "was solely for the benefit of the present congressional representative, the political party he represents, and not for the well-being of the citizens of the [former] Fourth Congressional District * * *". Furthermore, they allege (par. 11) that they are the victims of a "purposeful and systematic drawing of boundary lines to 'fence the Negro citizens out' of the new Sixth Congressional District." Except for an allegation that a number of Negro voters, formerly residents of the Fourth Congressional District, have not been included in the new Sixth District, the verified complaint is bare of

evidentiary facts showing either deliberate racial discrimination or partisan considerations in redistricting.

Appellants moved for a preliminary injunction restraining enforcement of Chapter 980 pending final disposition of the action. At a hearing held before a three-judge statutory court on May 10, 1962 (MOORE, Cir. J., BRUCHHAUSEN and ABRUZZO, D. JJ.), they were unable to produce any evidence to support the charges made in the complaint. Four witnesses testified: William Nance testified that he was a resident of the affected area and objected to the redistricting; Walter Sommer and Esiah Friedman testified that the southern boundary of the new Sixth District coincided with the northern boundary of the Negro neighborhood; finally, Michael Dubin testified that a neighborhood that used to be part of the old Fourth District, but is not part of the new Sixth, was predominantly Negro. Mr. Dubin admitted, under examination by the Court, that the district to which this neighborhood was transferred—the new Seventh District—had about the same ratio of Negro to white voters after the redistricting act as it had before the challenged Act was passed (Transcript, p. 89). On May 14, the three-judge court denied appellants' application for a preliminary injunction and set the case for trial on May 21, 1962 (Jurisd. Statement, p. 15). On May 17, the Court, in an amended opinion, declined to fix a specific date for trial (Jurisd. Statement, p. 14) in light of a stipulation between the parties extending the time for defendants to move or answer:* Instead, it provided that either party might move for trial at any time after May 25th. The Court reiterated its holding that no good cause had been shown for the granting of a preliminary injunction in advance of trial.

Thus, under this order, appellants could have obtained an early adjudication of the merits of their claims. How-

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* Appellees Governor, Attorney General and Secretary of State served and filed their answers on May 22, 1962.

ever, they chose not to press for an early trial. In fact, they asked the three-judge District Court to stay the trial pending the disposition of this appeal (Jurisd. Statement, p. 18); that application was denied.

Appellants then brought the instant appeal, and moved to advance it on the calendar. The motion to advance was denied on June 25, 1962.

Argument

Of course, the order denying preliminary injunctive relief should be disturbed only if the court below abused its discretion. *United Fuel Gas Co.* v. *Public Service Comm. of West Virginia*, 278 U. S. 322 (1929); *Alabama* v. *United States*, 279 U. S. 229 (1929). Indeed, it is significant that appellants have failed to comply with Rule 15(g) of this Court, which requires that they indicate specifically how the District Court abused its discretion. This omission alone is dispositive of the instant appeal.

Moreover, there can be no doubt that the District Court correctly denied appellants' application for a preliminary injunction. Appellants failed to produce facts to support their allegations; and there was a serious question whether they had even stated a legally sufficient claim. In the face of the grave doubts which perforce surrounded appellants' unsupported and somewhat nebulous allegations, their demand for such drastic relief—which would destroy New York's present system of Congressional districting—was sheer frivolity.

A. Appellants' evidence was insufficient to warrant a preliminary injunction.

Assuming arguendo that appellants' unsupported allegations of improper legislative motive could survive a motion to dismiss the complaint, these allegations and the evidence presented at the May 10 hearing nevertheless were

clearly insufficient to warrant the issuance of a preliminary injunction. The burden of alleging facts supporting the need for a preliminary injunction is on the plaintiffs; and this burden is not satisfied by the general allegations of purposeful discrimination that appear in this complaint. Evidentiary facts—conspicuously lacking here—must be presented. *Sims* v. *Greene*, 161 F. 2d 87 (3rd Cir. 1947); *Aeolian Co.* v. *Fischer*, 29 F. 2d 679 (2d Cir. 1928); *Behre* v. *Anchor Ins. Co.*, 297 Fed. 986 (2d Cir. 1924); *Washington Basketball Corp.* v. *National Basketball Ass'n*, 131 F. Supp. 596 (S.D.N.Y. 1955). It must appear from these facts that appellants' right to ultimate relief is reasonably free from doubt, or a preliminary injunction against State officials may not be granted. *Pearl Assur. Co.* v. *Harrington*, 38 F. Supp. 411 (D. Mass. 1941), *aff'd*, 313 U. S. 549 (1941); *Vergas* v. *Shaughnessy*, 97 F. Supp. 335 (S.D.N.Y. 1951); *Ross* v. *Neuville*, 34 F. Supp. 466 (E.D.N.Y. 1940).

There was no such showing here. The verified complaint contained no evidentiary facts at all except for some statistics which purported to show that a number of Negro voters who were part of the old Fourth Congressional District were not included in the new Sixth District. Neither did the evidence presented at the hearing add any further support to the allegations; appellants' witnesses testified only that the southern boundary of the new Sixth District coincided with the northern boundary of the Negro neighborhood. It is difficult to draw any inference from that fact alone, since it was inevitable that the results of the 1960 census would lead to a shift in district lines.

This feeble attempt to support appellants' very serious charges highlights the contrast between this case and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). Although this complaint is clearly designed to capitalize upon *Gomillion*, it falls far short of the mark. First, *Gomillion* went up on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)6; and this Court expressly disclaimed any con-

cern with the truth of the allegations (*Id.*, at 341). The diametric opposite is true of a hearing on application for preliminary injunction. Second, *Gomillion* involved an attempt to alter the boundaries of a city in such a way as to remove all save four or five of its 400 Negro voters while not removing a single white voter or resident, thus depriving these voters of the benefits of residence in that city such as the right to vote in municipal elections. This, the Court noted, "was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering" (*ibid.*)—language borrowed by the appellants in the instant case—and the Court went on to state that the situation was "tantamount for all practical purposes to a mathematical demonstration that the legislation is solely concerned with segregating white and colored voters . . ." And, against this claim, the City authorities were unable to suggest any legitimate function for the redrawing of the municipal boundaries. Here, again, we have the very opposite of the *Gomillion* situation. The justification for the redistrictng is clear: New York lost two Congressional seats as a result of the 1960 census. The mathematics of the redistricting is not at all startling: 20% of the Negro voters of the old Fourth District became voters of the new Sixth District (Par. 10, p. 7). Most important, appellants suggest no reason why anyone would prefer to exclude Negro voters from the Sixth District only to be forced to include them in an adjoining District. This is a far cry from the *Gomillion* situation, where the City authorities, by excluding Negro voters from the boundaries of Tuskegee, were able to disenfranchise them in municipal elections and deprive them of municipal services. In fact, it is difficult to make out any claim of disenfranchisement at all on the facts of the instant case.

As to the claim of political gerrymandering, there was not a shred of evidence advanced in the verified complaint or at the hearing.

Every application for preliminary injunction must be supported by factual proof, as we have noted. In the instant case, we submit that such proof must be even stronger than is normally required. For the complaint, in essence, attacks legislative motive—this nebulous concept, even if it were amenable to proof, is at best enormously difficult to prove. Cf. *McGowan* v. *Maryland*, 366 U. S. 420, 425-26, 468-69 (1961). To show a reasonable chance of success in this action, appellants would have had to demonstrate that they could rise to these difficulties.

In any event, they have yet to advance one iota of factual evidence that reasonably supports their position. There was absent any basis whatsoever to justify their application for a preliminary injunction.

B. There was serious doubt whether the complaint stated a claim upon which relief could be granted.

In order to obtain a preliminary injunction, it is obvious that appellants had to show not only facts to support their allegations but also that they state a claim whose legal merit is reasonably free from doubt.. *Pearl Assur. Co.* v. *Harrington*, 38 F. Supp. 411 (D. Mass. 1941), *aff'd*, 313 U. S. 549 (1941). We submit that they have not done so in this case.

First, under the Civil Rights Acts, a complaint must state facts, not merely conclusory allegations. *Snowden* v. *Hughes*, 321 U. S. 1 (1944); *Walker* v. *Bank of America Ass'n*, 268 F. 2d 16, 24 (9th Cir.), *cert. denied*, 361 U. S. 903 (1959); *Ortega* v. *Ragen*, 216 F. 2d 561, 563 (7th Cir. 1954), *cert. denied*, 349 U. S. 940 (1955). As we have already indicated in Point I, *supra*, this complaint is woefully deficient in this respect. Especially where, as here, it is crucial to show an intentional or purposeful discrimination, the failure to do so invites a motion to dismiss. *Snowden* v. *Hughes*, *supra*, at 8-9.

Second, the issues raised by the complaint appear to be nonjusticiable under the standards articulated in *Baker* v. *Carr*, 369 U. S. 186 (1962). The classic example of a nonjusticiable issue—the political question—is characterized by a lack of satisfactory criteria for judicial determination and the vesting of ultimate responsibility in another branch of government. *Baker* v. *Carr*, *supra*, at 210, 217, 226.

The Congress, and not the Courts, have the ultimate responsibility for determining the manner of electing Representatives. U. S. Const. Art. I, §§ 4, 5. Appellants' claim that the legislature has favored one party over another in drawing district lines is clearly not amenable to criteria normally employed by the judiciary; indeed, it is almost impossible to imagine "neutral" standards for drawing district lines. The only meaningful Congressional standard, requiring that districts be contiguous and compact, has long since lapsed. *Wood* v. *Broom*, 287 U. S. 1 (1932). And there is absent here the allegations of gross numerical inequality which made the complaint in *Baker* v. *Carr*, *supra*, amenable to judicial resolution.

The complaint of racial discrimination, while it might be justiciable in a proper case, adds no strength to the instant complaint. Appellants allege only that Negro voters were shifted from one Congressional District to another. Absent a showing that these voters are in some way prejudiced, this allegation is of no legal significance; it is merely an attempt to circumvent the "political questions" doctrine by superimposing an incongruous and inapposite claim borrowed from the entirely different situation presented in *Gomillion* v. *Lightfoot*, *supra*.

The complaint fails for a third and even more fundamental reason. Basically, it is an unsupported foray into legislative motive—a task which, absent the superficially obvious discriminatory purpose revealed in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), is neither competent nor

wise for the Courts to undertake. The attempt to taint New York's Congressional redistricting with a kind of legislative *mens rea* imagine a single "motive" for a large deliberative body; and that imagination is completely without support in reality. See *McGowan* v. *Maryland*, 366 U. S. 420, 425-26, 468-69 (1961); *Kotch* v. *Board of Pilot Comm'rs.*, 330 U. S. 552 (1947).

Since there was—to say the least—substantial doubt as to the legal sufficiency of the complaint, the three-judge Court properly denied a preliminary injunction.

C. The District Court properly denied a preliminary injunction under settled principles governing the exercise of equitable discretion.

Under settled principles of equity, plaintiffs failed to show the need for a preliminary injunction.

First, they failed to sustain the burden of showing that they will suffer irreparable injury if a preliminary injunction is not granted. This is a sin qua non for the relief sought. *Foundry Services, Inc.* v. *Beneflux Corp.*, 206 F. 2d 214 (2d Cir 1953); *Sims* v. *Greene*, 161 F. 2d 87 (3rd Cir. 1947). Yet, they alleged no facts showing irreparable injury and contented themselves with a bare conclusion to that effect. In fact, it was shown at the hearing (Transcript, pp. 93-94) that there was no immediate threat to appellants' interests since the nominating petitions were not due until August 7—nearly three months after the date on which appellants' application for a preliminary injunction was heard. Moreover, appellants specifically abjured any special concern with the forthcoming election (p. 95). And, of course, under the District Court's amended opinion, appellants have had an opportunity—since May 25—to move for an early trial. Thus, if they were entitled to the ultimate relief requested, they would be able to obtain a permanent injunction in a short time

and they would not need a preliminary injunction. Yet, they have not moved for trial. It is difficult to reconcile appellants' apparent lack of interest in an early adjudication of the merits with their claim of immediate and irreparable injury.

Second, even if there were facts tending to show irreparable injury, the District Court nevertheless was justified in denying relief. *Cf. Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681, 711 (N. D. Ill. 1960), *rev'd on other grounds*, 286 F. 2d 222 (7th Cir. 1961). To grant the injunction would be to give appellants a very substantial part of the relief they seek to attain at the end of the entire proceeding. *Foundry Services, Inc.* v. *Beneflux*, 206 F. 2d 214 (2d Cir. 1953). Under these circumstances, it would be manifestly unfair to appellees and, indeed, to the citizens of New York and their elected representatives, to frustrate their expressed intention before appellants were put to the test of proving—if that were ever possible—their as yet unsupported contentions.

Third, it must be remembered that a weighty public interest is involved in this proceeding. No injunction bond, no security could possibly compensate the citizens of the State of New York for the incalculable harm that would result from preliminary injunction. We need hardly labor the enormous implications of an election at large or even of a hastily drawn redistricting plan. Moreover, it should be noted that this complaint dwelled only on alleged inequities in one Congressional district among the forty-one set up by the challenged statute. Yet, if the preliminary injunction were granted, it would have affected the entire redistricting plan. It is clear, under these circumstances, that a court of equity need not grant a preliminary injunction—even if appellants show irreparable injury (which they have not done). *Yakus* v. *United States*, 321 U. S. 414, 440-41 (1944).

CONCLUSION

This appeal presents no substantial questions of public importance. The United States District Court did not abuse its discretion, and it correctly determined the issues involved. Therefore, the order should be affirmed or the appeal dismissed.

Dated: New York, N. Y., July 10, 1962

Respectfully submitted,

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